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No. 85-524

In the Supreme Court of the United States

October Term, 1985

ROBERT TUDOR,
Petitioner,

vs.

JEFFERY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF IN OPPOSITION

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9 pp

QUESTION PRESENTED

Since petitioner failed to raise any federal questions in the state trial court, and the state courts accordingly did not rule on any federal questions, must the petition for writ of certiorari be dismissed or denied for lack of jurisdiction in this Court under 28 U.S.C. Sec. 1257(3)?

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BRIEF IN OPPOSITION

A. The Petition Must Be Dismissed or Denied for Lack of Jurisdiction in This Court.

Petitioner at no time raised any federal question, constitutional or otherwise, in the state trial court proceedings. There was no evidence or contention presented that petitioner was an Indian or that his illegitimate child adopted by respondents was an Indian child; and there was no mention or intimation that any federal statute relating to Indians was relied upon or pertinent to the adoption proceeding in the state court.

Petitioner's statement (Petition, p. 6) that he challenged the state adoption statute on constitutional grounds in a post-hearing brief, is in error. There was no claim or intimation by petitioner in any of his filings or in the evidentiary proceedings in the state trial court raising

any constitutional objections whatever. (Petitioner's Motion for Order of Custody, filed November 22, 1983; Transcript of Proceedings January 4, 5, 1984, Vols. 1 and 2, including opening statements, evidence, and closing arguments; Robert Tudor's Suggested Findings of Fact and Conclusions of Law, filed January 16, 1984; Memorandum Brief of Respondent Robert Tudor, filed January 16, 1984). There was no evidence, statement or suggestion that Robert Tudor was of Indian blood; or that the child was of Indian blood. The federal Indian Child Welfare Act was not mentioned or relied upon.

Accordingly, the trial court's opinion and order granting the adoption did not mention or purport to rule on any federal issues. (Appendix to Petition, pp. 1a-12a). For the same reasons, the Kansas Court of Appeals' summary affirmance passed on no federal issues, constitutional or otherwise. (Appendix to Petition, p. 13a). The Supreme Court of Kansas denied review (Appendix to Petition, p. 14a), and thus necessarily declined to rule on any federal issues.

Under 28 U.S.C. Sec. 1257(3), this Court is granted power to review by writ of certiorari final judgments of the highest court of a state in which a decision could be had, where the validity of a federal or state statute is "drawn in question" on federal constitutional grounds, or where "any title, right, privilege or immunity" is specially set up or claimed under the federal constitution or federal statutes, treaties or commissions. If the claimed federal rights were not asserted in the state trial court, and were not passed upon by state appellate courts (even if raised by the party during appellate stages), this Court has no power to review the federal claims. *Bailey v. Anderson,* 326 U.S. 203 (1945); *Street v. New York,* 394 U.S. 576, 582 (1969).

Rule 21(h) of this Court requires these jurisdictional prerequisites to be stated in the Petition with specific reference to the record so as to "show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Petitioner made reference in his state appellate brief, and in his petition to the state supreme court, to federal constitutional questions; and made reference in the appellate brief, but not in his petition to the state supreme court, to the Indian Child Welfare Act. These appellate afterthoughts, however, were insufficient to timely and properly raise the federal questions which petitioner now asserts, where the state appellate courts did not pass on them. *Bailey v. Anderson,* 326 U.S. 203 (1945).

The Petition must be dismissed or denied for lack of jurisdiction.

B. Petitioner's Claim That He Was Denied Due Process and Equal Protection Is Groundless.

Leanne Marie Wedel, an illegitimate child, was born to Laurie Wedel on September 26, 1983. The mother consented to an adoption by respondents on the next day. Respondents filed their petition seeking the adoption on October 18, 1983. Not until November 24, 1983, did petitioner Robert Tudor even acknowledge his paternity. He failed and refused, without reasonable cause, to provide needed support for the child's mother during the pregnancy.

The Kansas adoption statutes were amended in 1982 to protect the rights of biological fathers of illegitimate children, as enunciated by this Court in *Caban v. Mohammed,* 441 U.S. 380 (1979). K.S.A. 59-2105 requires the

consent of the illegitimate father to an adoption unless the trial court finds the existence of one or more factors listed, such as that "(4) the father failed without reasonable cause to provide support for the mother during the six months prior to the child's birth."

In *Caban, supra,* the New York statute permitted the mother to block the adoption of her child simply by withholding consent. The father of the illegitimate child had no similar control, "even when his parental relationship is substantial" consisting of helping raise the children in a family setting for several years.

The Kansas statute, however, dispenses with consent from the father of an illegitimate child only when one or more significant factors defining the relationship, rationally justifying such action, are present. The validity of this treatment and classification under the due process and equal protection clauses is confirmed by *Lehr v. Robertson,* 463 U.S. 248 (1983), where the state statute required consent by the father of the illegitimate child only if the father had legitimated the child.

Petitioner was found to have failed, without reasonable cause, to support the mother during the six month period prior to birth—a time of great need for an expectant mother. In these circumstances, where the mother is forced to support herself during a time of hardship to bring an infant into the world, it is obviously a rational classification requiring that mother's consent to adoption, but dispensing with the consent of the father who has not cared enough about the child to provide support.

Petitioner herein was also afforded due process by being notified of the adoption proceeding and being permitted to present evidence and arguments. He sought only to avoid the factual findings enumerated in the Kan-

sas statute, being represented by counsel at that stage and every other stage in the state court system. Constitutional issues were not presented because they would have been insubstantial, just as they are at this late stage in the case.

C. The Indian Child Welfare Act Is Inapplicable.

The state courts did not pass on the alleged applicability of the Indian Child Welfare Act, 29 U.S.C. Secs. 1901, *et seq.*, because there was never any evidence or contention that either petitioner as the father, or the adoptive infant, were Indians.

Since the state court did not know and had no reason to know that an Indian child was involved (if indeed the child was Indian), there was no duty or occasion to give notice required by 29 U.S.C. Sec. 1912(a), pertaining to involuntary proceedings.

Moreover, Laurie Wedel, the natural mother of the infant, not only consented to the adoption by respondents, but affirmatively testified at the hearing in favor of such adoption. It was her testimony that if the adoption by respondents were refused, she would withdraw her consent and take custody of the child herself to prevent petitioner from taking the child:

> "Q. Now, Laurie, in the event that the Court would not grant the adoption, what are your wishes concerning the child?
>
> A. I would withdraw the consent and get her—try to get her myself.
>
> Q. And why—why do you feel that way?
>
> A. Because I feel I have a right home to go into with my parents who love her and not one that could

abuse her the way he abused me." (Tr. of Hearing, Case No. 83 A 57, District Court of Butler County, Kansas, Vol. 1, January 4, 1984).

Even had petitioner proved that the infant was an Indian child the federal Act would not require denial of the adoption since the natural mother is not claimed to be an Indian, and because she would withdraw consent and keep her child as against the claims of the natural father. 29 U.S.C. Sec. 1913(c).

CONCLUSION

The Petition should be dismissed or denied for lack of jurisdiction.

The Petition should also be denied because the federal claims are insubstantial and without any support in the record.

Respectfully submitted,

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